IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 1976

* * *

NO. 76-591

* * *

ANTONIO ORTIZ BORRAYO, a/k/a
TONY BORRAYO,

Petitioner,

V.

THE UNITED STATES OF AMERICA,

Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

G. PHIL BERRYMAN
800 Petroleum Tower
Corpus Christi
Texas 78401

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW . . 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE. 4

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT

ARGUMENT AND AUTHORITIES 6

A. The Petitioner's arrest and subsequent conviction resulted from a warrantless search and seizure conducted without probable cause in violation of the Fourth Amendment to the Constitution of the United States. . 6

B The affirmance by the United States Court of Appeals for the Fifth Circuit of the District Trial Court's judgment by Rule 21 Decision was a violation of the Federal Rules of Appellate Procedure whereby a process is prescribed for the correction of clerical errors in the record 11

C. The evidence was insufficient to sustain the conviction of the Petitioner and establish the necessary chain of custody that the illegal contraband seized from the Petitioner, if any, was the same introduced at trial on the merits. 12

CONCLUSION 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

CASES:

Aguilar vs. Texas, 378 U.S. 198 (1964). 10

Coolidge vs. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971). 8

Draper vs. United States, 358 U.S. 305 (1959) 10

Spinelli vs. United States, 393 U.S. 410 (1969) 10

Trupiano vs. United States, 334 U.S. 699, 68 S.Ct. 1229 (1948) 9

United States v. Martinez-Fuerte, et al, and Sifuentes v. United States, 96 S.Ct. 3074-3092 (July 6, 1976) 6

COURT RULES:

F.R.A.P. 10(e) 3, 11, 12

18 U.S.C. 2. 5

21 U.S.C. 841(a)(1). 5

28 U.S.C. 1254(1). 2

CONSTITUTION:

U.S. CONST. amend. IV. 3, 6, 7

APPENDIX

Appendix A - Order of the United States Court of Appeals for the Fifth Circuit Denying Motion for Rehearing, United States vs. Borrayo, 76-2059 . . . . . A-1

Appendix B - Summary Opinion of United States Court of Appeals for the Fifth Circuit, United States vs. Borrayo, 76-2059 . . . . . B-1

Appendix C - Unreported Opinion and Judgment of United States District Court for the Southern District of Texas, United States vs. Borrayo, 76-2059 . . C-1

IN THE
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ANTONIO ORTIZ BORRAYO, a/k/a
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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

Petitioner prays that a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be granted and entered in the above cause.

OPINIONS BELOW

The order overruling the Petitioner-Appellant's motion for rehearing is attached hereto as Appendix A. The judgment of the United States Court of Appeals for the Fifth Circuit is attached hereto as Appendix B. Both were unreported.

The trial court order is attached hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered August 19, 1976. (Appendix B) The petition for rehearing with a suggestion for a rehearing en banc was overruled on September 28, 1976. (Appendix A) The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

This case presents the questions of whether:

(a) The Petitioner's arrest and subsequent conviction resulted from a warrantless search and seizure conducted without probable cause in violation of the Fourth Amendment to the Constitution of the United States;

(b) The affirmance by the United States Court of Appeals for the Fifth Circuit of the District Trial Court's judgment by Rule 21 Decision was a violation of the Federal Rules of Appellate Procedure whereby a process is prescribed for the correction of clerical errors in the record;

(c) The evidence was insufficient to sustain the conviction of the Petitioner and establish the necessary chain of custody that the illegal contraband seized from the Petitioner, if any, was the same introduced at trial on the merits.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "The right of people to be secured...against unreasonable searches and seizures..."

Federal Rule of Appellate Procedure 10(e):

> "Correction or Modification of the Record. If any difference as to whether the record truly discloses what occurred in the

District Court, the difference shall be submitted to and settled by that Court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the District Court, either before or after the record is transmitted to the Court of Appeals, or the Court of Appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary, that a supplemental record be certified and transmitted. All other questions as to form and content of the record shall be presented to the Court of Appeals."

STATEMENT OF THE CASE

The Petitioner was arrested on June 17, 1974 at the Border Patrol Checkpoint located approximately five (5) miles of Sarita, Texas. The evidence was undisputed that Police Detective Carlos Torres, Jr. of the Brownsville, Texas, Police Department received reliable information from a confidential informant by telephone on June 7, 1974, that an individual named Antonio Borrayo had

approximately fifty (50) pounds of marijuana in his 1971 Buick automobile and was in route to Houston, Texas. The information was relayed to the Border Patrol Checkpoint. On June 17, 1974, some ten (10) days subsequent to the date that Officer Torres testified that he received the confidential tip, Border Patrol agents observed the suspect, subsequently determined to be the Petitioner herein, at the checkpoint. The Border Patrol officers conducted a warrantless search of the Petitioner's automobile, discovering suspected illegal contraband and placed the Petitioner under arrest.

On January 9, 1976, the trial of the Petitioner was conducted before the Court, without a jury, and the Petitioner was subsequently convicted and sentenced to serve three (3) years in a Federal Penitentiary with a special parole term of two (2) years for the offense of knowingly and intentionally possessing with the intent to distribute approximately forty-four (44) pounds of marijuana in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

Upon appeal to the United States Court of Appeals for the Fifth Circuit, the government attorney raised the point by footnote that the ten-day lapse and/or discrepancy in the date of the receipt of the informant's tip and the ultimate

arrest of the Petitioner was "apparently a typographical error in the transcript of the proceedings".

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT

ARGUMENT AND AUTHORITIES

A. The Petitioner's arrest and subsequent conviction resulted from a warrantless search and seizure conducted without probable cause in violation of the Fourth Amendment to the Constitution of the United States.

The validity of the warrantless search and arrest of the Petitioner of the cause in issue flies in the face of countless authoritative opinions dealing with the subject and intent of the Fourth Amendment to the Constitution of the United States. With regard to the general rules relating to and governing the authority of the Border Patrol Officials to stop and search automobiles, in United States v. Martinez-Fuerte, et al, and Sifuentes v. United States, 96 S.Ct. 3074-3092 (July 6, 1976), the Court held,

> "that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant. The

> principal protection of the Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop. See Terry v. Ohio, 392 U.S., at 24-27, 88 S.Ct., at 1881-1883; United States v. Brignoni-Ponce, supra, 422 U.S., at 881-882, 95 S.Ct, at 2580-2581. We have held that checkpoint searches are constitutional only if justified by consent or probable cause to search. United States v. Ortiz, supra. And our holding today is limited to the type of stops described in this opinion. '[A]ny further detention. . must be based on consent or probable cause.' United States v. Brignoni-Ponce, supra at 882, 95 S.Ct., at 2580."

Because the record clearly shows that the Petitioner did not consent to the search, the only issue before the Court is whether probable cause existed for the search. As stated, the record shows that ten (10) days prior to the search and seizure, information was supplied by a confidential informant and subsequently relayed to the Border Patrol Checkpoint that the Petitioner was en route (emphasis added) to Houston, Texas, with marijuana in his automobile. This information

has been proven by the record in this case to be incorrect and thus unreliable as a basis to conduct a legal search and seizure by any law enforcement official in that the Petitioner was obviously not en route (emphasis added) to Houston as alleged by the informant on June 7th, in that Petitioner arrived at the Border Patrol Checkpoint on June 17th, ten (10) days later. Therefore, this incorrect and stale information allegedly supplied by the informant would not warrant a search and seizure on June 17th without a search warrant.

Additionally, in light of the uncorrected record of testimony which was adduced at trial, the ten-day lapse of time between the date one law enforcement officer received a confidential tip from an informant, to-wit: June 7, 1974, and the date that the Petitioner was arrested, to-wit: June 17, 1974, was more than adequate time in which the law enforcement officers could have obtained a search and arrest warrant had they been so inclined or disposed. In this regard, the Petitioner would assert that the rational of Coolidge vs. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971) is directly aligned wherein it provides that there is a difference between the search of a store, dwelling house, or other structure in respect to a search of a motorboat, or automobile. In this vein,

the Court held that the requirement to obtain a warrant imposes no inconvenience whatever when it is practicable to secure a warrant and when the vehicle cannot quickly be moved out of the locality or jurisdiction of the warrant being sought. In other words, as was the case in Trupiano vs. United States, 334 U.S. 699, 68 S.Ct. 1229 (1948), the investigators in their failure to procure a search or arrest warrant when there is available ample opportunity to do so, take the chance of conducting an unreasonable and illegal search and the subsequent reversal of a conviction based upon the illegal fruits of the search and seizure.

As evidenced by Appendix C, the order of the Trial Court clearly sets forth the issue before the Court as follows:

> "The Court must only decide whether there existed probable cause, based on the tip of a confidential informant, to justify a warrantless search of the vehicle."

Therefore, the conclusion that the existence of ten days is not ample opportunity to allow a law enforcement officer to obtain the necessary search and arrest warrants based upon the information of their reliable sources and further, the allowance of a warrantless search and

arrest based upon the assertion of exigent circumstances after the lapse of this ten-day period is and clearly amounts to a far and gross departure from the accepted standards and rules governing issues of this context and should accordingly be reversed.

Alternatively, even assuming that the ten-day lapse and period of time justified the law enforcement officers in not first obtaining or even attempting to obtain a search warrant, the Petitioner asserts that the information originally received on the first day, to-wit: June 7, 1974, had long grown too stale, remote and unreliable, and at best did not provide any exigent circumstances upon which the arresting Border Patrol Officers could rely upon in stopping, detaining, searching and arresting the Petitioner. Such remoteness, irrelavance and lack of consistency would have fallen far short of the standards set forth in the landmark cases of Draper vs. United States, 358 U.S. 305 (1959), Aguilar vs. Texas, 378 U.S. 198 (1964), and Spinelli vs. United States, 393 U.S. 410 (1969).

Accordingly, this Court, based upon the before argument and authorities, should grant a writ of certiorari and reverse the United States Court of Appeals for the Fifth Circuit in order that the judgment is aligned with the other applicable decisions of this Court.

B. The affirmance by the United States Court of Appeals for the Fifth Circuit of the District Trial Court's judgment by Rule 21 Decision was a violation of the Federal Rules of Appellate Procedure whereby a process is prescribed for the correction of clerical errors in the record.

One additional and further point with regard to the ten-day lapse of time which was not raised until the Petitioner's appeal was before the United States Court of Appeals for the Fifth Circuit, was that the Appellate Court failed to apply its own rules of appellate procedure in the resolution of a clearly material point in issue. In other words, assuming that the ten-day lapse or discrepancy of time between the date the Police Officer received the informant's tip and conveyed the same to the Border Patrol and the day of the arrest of the Petitioner can be explained away as a mere clerical or "typographical error in the transcript of the proceeding", as was alleged in the government's original brief on appeal, the Petitioner would assert that the very least he should be entitled to is a remand to the Trial Court pursuant to Rule 10(e), Federal Rules of Appellate Procedure, which provides a means of correction or modification of the record.

While the Petitioner continues to stand by his proposition that the record is clear and that the ten-day lapse of time adduced at trial is properly before the Court and within the record, the Petitioner would at least urge that he be granted the right to have this matter determined and cleared up, if possible, pursuant to the before-cited rule of appellate procedure, especially in light of the fact that the accusation of an error by the official court reporter was made by the government's attorneys and not by the Petitioner.

Refusal of the United States Court of Appeals for the Fifth Circuit to resort to the use of this rule when potentially applicable and clearly pertinent to a material issue before them on appeal amounted to an injustice and departure from the accepted and usual course of judicial proceedings.

In summary, the apparently inconsistent rational followed by the United States Court of Appeals for the Fifth Circuit in upholding the warrantless search while ignoring Rule 10(e), Federal Rules of Appellate Procedure, merits the granting of a writ of certiorari and the reversal of the cause.

C. <u>The evidence was insufficient to sustain the conviction of the Petitioner</u>

<u>and establish the necessary chain of custody that the illegal contraband seized from the Petitioner, if any, was the same introduced at trial on the merits.</u>

The Petitioner would assert that the government has failed to sustain their burden and that the evidence is insufficient to establish the requisite chain of custody for the illegal contraband allegedly recovered from the Petitioner. In this regard, the Petitioner would assert that there exists a gaping hole in the chain of custody between the substance analyzed by the chemist at the Drug Enforcement Administration Laboratory and the substance allegedly seized from the Petitioner's automobile on the date of his arrest.

In this regard, it is uncontroverted that the Petitioner and the government entered into a stipulation regarding the fact that on the date of the Petitioner's arrest, the Drug Enforcement Administration Laboratory was referred a "green, leafy" substance later determined to be marijuana. But what is in issue and has yet to be established through admissible proof by the government is the chain of custody tending to establish that the "green, leafy" substance, if any, seized from the Petitioner was the same "green, leafy" substance which was later

determined to be marijuana and was the subject of the before-mentioned stipulation.

In other words, there is no direct or indirect evidence to establish that the same (emphasis added) substance suspected of being marijuana that was allegedly seized from the Petitioner is the same (emphasis added) substance that was mailed to the Drug Enforcement Administration Laboratory in Dallas, and subsequently determined to be marijuana. Further, it cannot be implied nor inferred that the stipulation is or was intended to establish such a chain of custody or even provide any missing link, because it simply cannot be said that a partial stipulation by the Petitioner relieves the total burden of the government's case.

The reliance by the government that the stipulation ties together two (2) loose and dangling strands of "green, leafy" substances, and the subsequent Trial Court's order and affirmance by Rule 21 Decision in the United States Court of Appeals for the Fifth Circuit necessitates the granting of this writ of certiorari.

CONCLUSION

For the reasons and authorities set forth above, your Petitioner prays that

this Court grant his petition for a writ of certiorari and either summarily reverse and render judgment in favor of the Petitioner or reverse after briefs have been submitted and arguments heard in the cause.

Respectfully submitted,

G. PHIL BERRYMAN
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Mark H. Giles, a member of the Bar of the Supreme Court of the United States do now enter my appearance in the Supreme Court of the United States in the above-mentioned cause on behalf of Petitioner and G. Phil Berryman, attorney of record for Petitioner and a member of my law-firm. I do therefore certify that three (3) copies of the foregoing Petition have been served by placing same in the United States Mail, First Class, Certified and Postage Pre-paid, on this the 22nd day of October, 1976, addressed to:

Solicitor General of the United States
U.S. Department of Justice
Washington, D.C. 20530

Mark H. Giles

APPENDIX A

UNITED STATES COURT OF APPEALS

Office of Clerk
Edward W. Wadsworth
Clerk

FIFTH CIRCUIT

Sept. 28, 1976
TEL 504-589-6514
600 Camp Street
New Orleans, LA. 70130

TO ALL COUNSEL OF RECORD

No. 76-2059-U.S.A. vs. Antonio Ortiz Borrayo, a/k/a Tony Borrayo

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Clare F. Sachs
Deputy Clerk

cc: Mr. G. Phil Berryman
Mr. James R. Gough

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-2059
SUMMARY CALENDAR*

DO NOT PUBLISH

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ANTONIO ORTIZ BORRAYO, a/k/a Tony Borrayo,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(August 19, 1976)

BEFORE COLEMAN, GOLDBERT and GEE, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21. 1/

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*Rule 18, 5 Cir., see Isbell Enterprises, Inc., v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966

APPENDIX C

ORDER

(Caption Omitted)

The Defendant Antonio Ortiz Borrayo was arrested at approximately 9:00 o'clock p.m. on June 17, 1974, at the permanent alien checkpoint located some five miles south of Sarita, Texas. A search conducted prior to his arrest uncovered some forty-four pounds of marijuana in his vehicle. The Defendant has filed a motion to suppress the seized marijuana and certain statements made at the time of his arrest.

While this case was treated as a so-called checkpoint case by the Defendant and the government when they filed their initial pre-trial motions and responses, it is certainly not such a case. It was tried before the Court and the evidence introduced at the time of the hearing on the motion to suppress, which was carried along, made it clear that the validity of the search does not depend upon whether the Sarita checkpoint is a functional equivalent of the border or whether the officer on the point observed things about the car or its occupants which gave him probable cause to conduct the search. The Court must only decide whether there existed probable cause, based on the tip of a confidential informant, to justify a warrantless search of the vehicle. As this was a moving vehicle, there existed the necessary "exigent circumstances" to dispense with the need for a warrant, *Coolidge v. New Hampshire*, 403 U.S. 443, 474-475 (1971), and therefore the validity of the search depends solely on the existence of probable cause for such search.

As the facts developed at the hearing, Officer Torres of the Brownsville Police Department, on the date of the Defendant's arrest, received a tip from a confidential informant that a black-over-white 1971 Buick, bearing specific Texas license plates, was headed north to Houston, bearing a large quantity of marijuana under the back seat. The informant stated that the vehicle had departed some ten minutes before and was occupied by a man and woman, both named Borrayo. This informant had proved his reliability by giving accurate information to this officer on eight to ten prior occasions. Officer Torres immediately relayed this information to the Border Patrol sector headquarters in McAllen, Texas. This information was, in turn, relayed to the permanent alien checkpoint at Sarita, Texas, and there the complete information was recorded on the "lookout list."

Officer Fuentes was manning the point at the checkpoint that night and had primary inspection responsibility for each oncoming car. At about 9:00 p.m., he saw an automobile approaching the checkpoint which matched the descriptive information on the "lookout list." The officer waved the vehicle over for secondary inspection. The driver of the car, apparently thinking that he had been waved on through the checkpoint, rolled by at a moderate rate of speed. Officers Fuentes yelled at Officer Hipple, who was also on duty, and quickly confirmed that this was the car on the "lookout list." Officer Hipple took up chase and quickly stopped the car a mile beyond the checkpoint. He ordered the driver to return to the checkpoint, which he did. A search of the vehicle back at the checkpoint uncovered the contraband exactly where the informant had said it would be.

The Defendant was put under arrest. He was subsequently read his Miranda warnings by Drug Enforcement Administration Special Agent Louis Dracoulis and made a statement to this agent that he was carrying this marijuana north to Houston for the purpose of sale.

It is clear that the observations of officers Fuentes and Hipple concerning the Defendant's car, its description, license plates, its direction of travel, and its occupants, corroborated the tip of a reliable informant. The corroboration of a tip from a previously reliable informant will support a finding of probable cause. *United States v. Anderson,* 500 F.2d 1311, 1316-1317 (5th Cir. 1974); *United States v. Nieto,* 510 F.2d 1118, 1120 (5th Cir. 1975). The Court finds there was probable cause for this search and therefore finds that the Defendant's motion to suppress the seized contraband must be denied.

As the Court has found the seizure of the contraband and therefore the subsequent arrest to be valid, the Defendant's argument that his self-incriminating statements must be suppressed because they were the result of an illegal arrest must fail. The Defendant having urged no other objections to these statements, his motion to suppress them must also be denied.

The quantity of marijuana seized and the Defendant's statements to Agent Dracoulis prove beyond a reasonable doubt that the Defendant is guilty of possession with intent to distribute marijuana as alleged in the indictment.

Sentencing of this Defendant is hereby set for the 23rd day of February, 1976, at 9:00 o'clock a.m., in Corpus Christi, Texas, and this Defendant Antonio Ortiz Borrayo is ORDERED to appear before this Court on said date

and at the time stated. The Court orders that a presentence investigation be prepared prior to such date.

IT IS SO ORDERED.

SIGNED this 19th day of January, 1976.

/s/ OWEN D. COX
Owen D. Cox
United States District Judge